No. 13,654

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,	*Appellant,*
vs.	
GERALD J. TRUBOW,	*Appellee.*

Appeal from the United States District Court for the Northern District of California, Southern Division.

SUPPLEMENTAL BRIEF FOR APPELLEE.

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STATEMENT.

As stated in appellant's supplemental brief, this is an action arising under the Federal Tort Claims Act for personal injuries sustained by the appellee at the Marine Hospital in San Francisco. Appellee's statement of the facts, which differ somewhat from appellant's can be found in appellee's brief in action No. 12,955, which brief may be used in the present appeal pursuant to stipulation.

It should be noted that on the previous appeal it was the suggestion of this Court that this matter be remanded for a finding on contributory negligence

and, inasmuch as this matter was being remanded, that other specific findings be made by the lower Court. Furthermore, at this prior hearing the Court did listen to the arguments relative to liability under the Act, then remanded the said case.

New findings were made by the District Court and judgment was entered in favor of the plaintiff once again and the Government thereupon appealed from the same.

ARGUMENT.

The appellant has again presented basically two arguments, first, that there was no evidence that the Government had notice of the defect involved in said case and, secondly, that this type of liability does not come within the Federal Tort Claims Act. The first argument, of course, was presented under the theory that the findings of the District Court are not supported by the evidence.

I. FINDINGS OF THE DISTRICT COURT ARE SUPPORTED BY THE EVIDENCE.

The appellant first attacks the findings on actual or constructive knowledge on the part of the United States as to the existence of the defect, as being no more than an inference or conclusion and that, as a consequence, such findings are not entitled to the protection of Rule 52(a) of the Federal Rules of Civil Procedure. It is appellee's contention that the

findings were findings of fact and not an inference or conclusion. The Court heard evidence from which it could find as a matter of fact that the defect was known, or should have been known, by the Government's employees.

Furthermore, it is appellee's contention that the cases cited by the appellant in support thereof are not applicable whatsoever since they go into a question as to whether a certain sum of money, for example, a fee charged, was reasonable, evidence having been produced by both sides as to what was reasonable. This the Court held was not a question of fact but rather an inference or conclusion. However, in the present case it can readily be said that a question of knowledge of a defect is a question of fact.

It is also respectfully submitted that the findings of fact of the lower Court were not contrary to the evidence and clearly erroneous as contended by appellant but, rather, reflect the evidence as actually adduced at the trial and therefore should not be disturbed by the Appellate Court.

Appellant's main argument in its supplemental brief goes to the question as to whether the dangerous condition had existed for a sufficient length of time to be noticeable so as to charge the defendant with knowledge in failing to discover it. The appellant has cited the case of *McGregor v. Sears, Roebuck & Co.,* 107 F. Supp. 918 (S.D.Cal.). However, a closer examination of that case discloses that the facts are not at all similar in that in that case the plaintiff

slipped on what was apparently a combination of waxed paper and a wet floor. The Court, in discussing the case, stated that there was no showing that the paper on the floor or the wet floor had been there long enough to be called to the attention of the defendant and it was doubted that the paper had come from the store. Contrasted with this is the present case where the defendant's employees testified that the elevator was used daily by them and almost exclusively by them, and therefore the defect was, or should have been known to them prior to the accident.

It seems apparent that there was sufficient evidence in this case from which the Court could find as a matter of fact that the United States Government, through its employees, had actual or constructive knowledge of the defect a sufficient time prior to the accident.

II. THE LIABILITY IN THIS CASE COMES WITHIN THE FEDERAL TORT CLAIMS ACT.

The Government once again contends that only in those cases where the individual federal employee himself would be personally liable to the injured plaintiff does the language of the Federal Tort Claims Act allow liability to be imposed upon the Government under the *respondeat superior* theory and, as authority therefor, has cited the case *In re Texas City Disaster Litigation,* 197 Fed. 2d 771. However, a careful reading of that case shows that the Court, in making its decision, came to the conclusion that the

negligent acts of the employees of the Government came within the statutory exceptions to the Act, namely, performing a discretionary function or duty or executing a statute or regulation. It is clear that in the present case there is no claim whatsoever as to any exemptions. Instead, the appellant contends that the present type of liability does not come within the Act.

It is appellee's opinion that the case of *U. S. v. Hull,* 195 Fed. 2d 64 (C.A. 1), meets this specific problem directly. In that case the plaintiff was injured by a defective window in a post office which fell down on her hand as she placed her hand through the window to acquire some stamps. The lower Court held for the plaintiff and the United States, the defendant, appealed, one of the bases for appeal being that under the Federal Tort Claims Act, the United States can be held liable *only* where some employee himself is legally liable to the person injured and that, though an agent or servant of the landowner would be subject to liability for negligently creating a dangerous condition on the premises likely to injure a third person, yet where there was no finding of specific misfeasance and assuming the retaining mechanism was defective and some Government employee was under a duty to inspect and repair it, his nonfeasance in failing to repair the allegedly defective window constituted a breach of duty owed by him to the United States but not to appellant. The Court at page 67, in stating its opinion, actually was also stating appellee's argument in the present case:

> "To argue as appellant does that the United States would be liable only if some government employee were guilty of misfeasance ignores the phrase 'or omission' occurring twice in the statutory language."

Further quoting the Court in the *Hull* case, it stated:

> "But 28 U.S.C. Sec. 1346(b) does not say that the United States is liable in tort only where the employee himself is legally liable to the person injured. In effect, the United States argues for an interpretation of the latter part of the section as though it read '* * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant (and where the employee would also be liable to the claimant) in accordance with the law of the place where the act or omission occurred * * * an unwarranted interpolation."

It should also be noted further, in support of appellee's argument, that the Court, in discussing the question of misfeasance and nonfeasance, did state that in the case of an employee who has undertaken the job of inspecting and repairing portions of business premises which, if allowed to fall in disrepair, are likely to cause injury to business invitees and if the employee negligently fails to perform such duties as a result of which foreseeable injury results to a business invitee, *then there is more than mere nonfeasance* and, since reliance has been induced by the employee, the law of tort imposes upon him an

affirmative duty to business invitees to use care to perform his undertaking.

Also, in the Third Circuit, the *Hull* case was followed in the case of *Jackson v. U. S.,* 196 Fed. 2d 725. In that case the plaintiff suffered injuries while descending the steps of a post office at night and the Court stated:

> "The maintenence of post office property in an unreasonably dangerous condition is just as much the negligent omission of an employee of the government as is the failure to heed a stop sign by a driver of a mail truck."

It would seem that from the foregoing cases and the cases previously cited in appellee's other brief that the Courts throughout the country are in accord that the type of liability involved in this case comes within the statutory words "* * * negligent or wrongful act or omission of any employee of the Gvoernment * * *"

CONCLUSION.

It is respectfully submitted that the judgment below should be affirmed and that appellant's appeal on file herein be denied.

Dated, San Francisco, California,
March 6, 1953.

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